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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 68

THOMAS R. DAVIS, *Appellant*,

v.

RALPH NEELY and VIRGINIA GAYLORD NEELY, *Appellees*.

On Appeal from the Supreme Court of Oklahoma

REPLY TO APPELLEES' MOTION TO DISMISS THE APPEAL

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As authorized by Rule 16 of this Court, appellant respectfully replies to the Motion to Dismiss the Appeal filed by the appellees herein, as follows:

I

THE DUE PROCESS QUESTION IS PROPERLY BEFORE THIS COURT.

The appellees argue that appellant never questioned the constitutionality of the state statutes involved, the Children's Court Act and the Uniform Adoption Act, in the state courts, but such is not the case. Appellant has objected vigorously, all the way from the trial

court to this Court, that the manner of *application* of these statutes to him amounted to a complete denial of the due process of law guaranteed to him under the Fourteenth Amendment.

Vice Chief Justice Halley in his dissent most clearly points out that the adoption law, properly construed, limits the adoption court in deciding the necessity of consent issue to a determination of whether there *has been* a judicial determination of custody rights adverse to the non-consenting parent. The trial court, and the affirming opinion of the Oklahoma Supreme Court, mistakenly held that because this adoption was pending in a particular special court the trial judge was authorized to deprive appellant of all custody rights *in the adoption proceeding itself*. This is clearly error. ***But this is not the gist of the grievance.*** The vice of the whole case, so far as due process is concerned, is that the trial court undertook to deprive appellant of all parental rights in the adoption hearing in total disregard of the following facts, to-wit:

1. Appellees sought no such relief in their petition for adoption;

2. Appellees sought no such relief in their application to obtain an order declaring appellant's consent to be unnecessary;

3. No notice of any kind was given to appellant prior to the hearing, to advise him that he should be prepared to resist a claim to such relief; and

4. Appellant repeatedly, vigorously and unmistakably objected to every item of evidence and testimony offered by appellees in the trial court

not directly bearing on the question of his *prior* judicial deprivation of parental rights.

It is not the statutes themselves that violate constitutional rights, nor is it merely the erroneous construction of these statutes adopted by the Oklahoma courts. Rather, it is the application of such erroneous construction to appellant's case in such a way as to deny him the elementary rights of notice and a fair opportunity to prepare for trial on such issues as have been properly framed by the pleadings.

The question of constitutionality of a state statute is not to be decided on the wording of the statute alone, but on the construction of that statute by the state court of last resort, and this Court will exercise its individual judgment to determine the federal question whether the act, *as construed and applied,* is repugnant to the Fourteenth Amendment. *Ward and Gow v. Krinsky,* 259 U.S. 503.

Complaint of the appellant against the manner in which the Uniform Adoption Act was construed and applied was made at every opportunity in the trial court and in the Oklahoma Supreme Court. (Jurisdictional Statement, pp. 15-18).

The State action which is reviewable under the Fourteenth Amendment is the composite result of both legislation and *judicial interpretation. Wheeling Steel Corporation* v. *Glander,* 337 U.S. 562.

What the statutes of a State mean, the extent to which any provision may be limited by other Acts or other parts of the same Act, are questions on which the highest court of the State has the final word. *Musser* v. *State of Utah,* 333 U.S. 95. The final word

of the Oklahoma Supreme Court, from which this appeal is taken as of right, is that under the Uniform Adoption Act in Oklahoma, if an adoption is sought in the Children's Court of Oklahoma County, a non-consenting parent, though not previously deprived of parental rights so as to make his consent unnecessary, may, in that proceeding, *outside of the pleadings and without notice,* and over his objection to the introduction of evidence on such extraneous issue, be *then and there* deprived of all custody rights so as to enable the court to proceed with the adoption without his consent and over his protest.

Therein lies the constitutional violation of the Oklahoma statute, as construed and applied by the Oklahoma courts, and against which appellant struggled in the trial and all the way through a petition for rehearing in the highest court of the State. That his complaint was considered as an issue in the Oklahoma Supreme Court is clear from the able dissent of the Vice Chief Justice. (Jurisdictional Statement, p. 15a).

II

THE FULL FAITH AND CREDIT QUESTION IS PROPERLY BEFORE THIS COURT.

From the very beginning of this litigation appellant urged that the Courts of Oklahoma were required to give full faith and credit to th California decision in *Davis* v. *Davis,* 177 Cal. App. 2d 75, 1 Cal. Rptr. 923, confirming and enlarging his rights of custody and visitation, which recognition, if given, would have made it impossible to proceed with the adoption without his consent. Nor do appellees deny that the full faith and credit question was properly presented and preserved by appellant at every stage. Instead they

argue that the decision appealed from can be supported on non-federal grounds.

Such is not the case, for the Supreme Court of Oklahoma, in its majority opinion ignoring the effect of the full faith and credit clause, denied appellant's rights to due process under the Fourteenth Amendment. In order to escape the bar to the adoption posed by the California decision the Oklahoma Supreme Court had to put the stamp of approval on a lower court proceeding and decision which flagrantly denied appellant's rights to notice and opportunity to prepare for the hearing.

We earnestly submit that this evasion of the full faith and credit question by the Oklahoma courts, coupled with their attempt to deprive appellant of legally protected parental rights in a hearing not designed for that purpose, without notice that such issue would be taken up, amounts to an obvious subterfuge to evade consideration of a federal question.

Although the majority Oklahoma opinion carefully avoids full faith and credit, the dissent of Halley, V.C.J., shows that the matter was under consideration by at least some members of the Court, for he points out (Jurisdictional Statement, p. 17a) that the latest judicial determination as to custody rights, prior to the adoption, had been made by the California divorce court which granted appellant partial custody. As he so clearly states, if appellees thought there had been a change of circumstances since the California determination, they should have invoked the orderly jurisdiction of a proper court to obtain a revision of custody rights, in a proceeding designed for that purpose, and with adequate notice and hearing afforded to appellant.

Appellees contend that even if the Oklahoma Supreme Court had reached the full faith and credit issue, this appeal would not present the question reserved in *Halvey, Kovacs* and *Ford*, since the record shows a change of circumstances since the latest California decree. But their argument is not tenable, for the following reasons:

(1) Full faith and credit requires that the California decree receive the same recognition in Oklahoma which it would receive in California, and in that state the earlier decree would have been fully res judicata in the absence of (a) change of circumstances since it was rendered, or (b) some showing of "special circumstances," which would justify, very unusually, a non-recognition of the previous decision. *Goto* v. *Goto*, 52 Cal. 2d 118, 338 P. 2d 450; *Foster* v. *Foster*, 8 Cal. 2d 719, 68 P. 2d 719, 723.

(2) In their petition for adoption, and in their application to dispense with appellant's consent, appellees did not plead any change of circumstances, nor did they ask for any relief based on any change of circumstances. They never made any effort to amend their pleadings in that respect.

(3) There was no notice given to appellant that change of circumstances since the California decision would be an issue in the Oklahoma proceeding.

(4) The evidence appellees rely on as showing a change of circumstances was offered and received over the repeated and continuing objection of the appellant, such evidence being outside the issues and outside the notice given to appellant and not properly before the court.

(5) Such evidence, considered most favorably to appellees, does not show any significant change

of conditions since the California decree, nor does it show any "special circumstances" which would cause a California court not to recognize its earlier decree.

(6) Neither the trial court nor the Supreme Court of Oklahoma made any finding that there had been any change of circumstances since the California judgment, or that any "special circumstances" existed, which would justify the courts of Oklahoma in denying full faith and credit to the California decree. The adoption court simply held the California judgment "void," and then ruled that it had the right to decide all questions of custody. The Supreme Court of Oklahoma ruled that the Children's Court of Oklahoma County had the right, not found in Oklahoma adoption courts generally, to decide the question of custody afresh, without reference to previous decisions of other courts and without any showing of a change of circumstances.

This ruling of the highest court of Oklahoma flouts full faith and credit, for even if the evidence received by the trial court over appellant's objection had been within the pleadings and covered by the notice given appellant, still it fell far short of proving any change of circumstances which would constitute a justification for non-recognition of the California decree, and *neither the trial court nor the Oklahoma Supreme Court made any such finding.*

The decision appealed from is thus a clear-cut refusal to comply with full faith and credit requirements with no attempt whatever to justify such non-recognition by any finding of change of circumstances, and this court should take jurisdiction to correct it.

III

APPELLANT HAS MAINTAINED EXACTLY THE SAME POSITION AND THEORY THROUGHOUT THIS LITIGATION.

Appellees complain that appellant changed his theory of the case on appeal to the Oklahoma Supreme Court. The record will not bear it out. On the contrary, it is appellees who deparated from their original position during the course of the litigation below.

When appellees filed their petition for adoption they pleaded that appellant had already been judicially deprived of all custody rights. They pleaded no change of circumstances since the California decree, and sought no relief based thereon. They gave no notice to appellant that they would seek a decree in the adoption proceeding to divest him of all rights of custody and visitation. Yet when the trial took place they offered, and the trial judge received, evidence which could have no relevance to the issues framed by the pleadings and contemplated by the Uniform Adoption Act, all of which evidence was resisted at every step by appellant. In the Supreme Court of Oklahoma and here they now contend that all of this could be done by virtue of special powers given to the Children's Court of Oklahoma County.

On the other hand, appellant has steadfastly maintained, from the very inception of the case, that under the mandate of the full faith and credit clause he is entitled to have the California decree recognized in Oklahoma, and that the parental rights given him under that decree pose an absolute bar to an adoption without his consent.

If either appellees or the trial court conceived, either prior to the trial or during it, that the Chil-

dren's Court of Oklahoma County had the particular power now claimed for it, they kept their views quite secure from the sight or knowledge of appellant. The record shows that it was not until the end of the hearing that appellees claimed any such power, and the trial judge himself could not be drawn out on the subject with any clarity at all until he rendered his final decision.

IV

THE CHILDREN'S COURT OF OKLAHOMA COUNTY CANNOT HAVE THE POWERS CLAIMED FOR IT.

The majority opinion of the Oklahoma Supreme Court admits that until the adoption of the Children's Court Act (which applied only to Oklahoma County, due to the population bracket adopted) Oklahoma adhered to the rule so clearly contemplated by the Uniform Adoption Act, that controversies respecting termination of parental rights should be settled in other proceedings before an adoption is sought over the objection of a parent. (Jurisdictional Statement, p. 7a). But the Oklahoma court then goes on to hold, we submit erroneously, that the act creating this special court makes an adoption there different from one conducted anywhere else. We think this itself is a violation of due process, or of equal protection of the laws so closely related to due process as to be a question for this Court on appeal. But more than that, even if the Children's Court has this special power, it cannot be permitted to exercise it *without notice*, as was done here. To put it another way, if the Children's Court of Oklahoma County has the power to do what was done here, then it is uniquely free of the restraints uniformly imposed on all other courts by the Fourteenth Amendment, which elsewhere always

requires that a litigant be afforded notice and a fair opportunity to prepare for trial.

CONCLUSION

Full faith and credit was invoked by appellant from the very first and through every stage of this litigation. Appellees do not question this. In the trial court when it first became apparent that it was the purpose of appellees and the trial court to force him to trial on an issue not contemplated by the Uniform Adoption Act, outside the pleadings, and without notice, appellant vigorously and repeatedly made his objections known, and he asserted lack of due process at every opportunity thereafter, to and including his petition for rehearing.

It will not do to say, as appellees urge, that the Oklahoma courts may avoid their duty to recognize the California decree by making a new determination, contemporaneous with the adoption, denying parental rights to appellant, ***without notice and over his objection, and without a change of circumstances being shown.***

The case is properly here. This Court should affirm jurisdiction, otherwise valuable constitutional rights will be lost to appellant through no fault of his own.

Respectfully submitted,

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